IN THE

Supreme Court of the United States

October Term, 1978

No. 77-926

GERALDINE G. CANNON,
Petitioner,

v.

THE UNIVERSITY OF CHICAGO, *et al.*,
Respondents.

GERALDINE G. CANNON,
Petitioner,

v.

NORTHWESTERN UNIVERSITY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF YALE UNIVERSITY AS *AMICUS CURIAE*

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INDEX

TABLE OF CITATIONS

Cases

Constitution

Statutes

Congressional Reports

Other

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STATEMENT OF INTEREST*

Yale University is a private nonprofit institution of higher education. It was founded in 1701, and today consists of an undergraduate school, a graduate school of arts and sciences, and ten professional schools at the graduate level.

Yale educates both men and women in all its schools and departments. Women have been admitted to the Yale Graduate School since 1892, to the Yale Law School since 1918, and to most of the other professional schools for several decades. Yale's historically all-male undergraduate school first admitted women in 1969, and women

* The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 42(2).

presently account for approximately 37% of the total number of undergraduate students.

Yale receives federal financial assistance in many of its education programs and activities and is subject, in regard to such programs and activities, to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"). Yale is the defendant in a civil action pending in the District Court for the District of Connecticut, in which the plaintiff's sole claim of a federal cause of action is that private remedies are implied under Title IX.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner claims a private right of action under Title IX, although the statute does not expressly confer such a right. Petitioner argues, under the criteria stated in *Cort* v. *Ash*, 422 U.S. 66 (1974), that a private right of action is implied. The respondents, the University of Chicago and Northwestern University, argue that a private right of action is not implied. Yale agrees with the respondents that Title IX implies no private right of action.

Title IX was enacted by Congress in the exercise of its spending power. Ever since this Court's decision in *United States* v. *Butler*, 297 U.S. 1 (1935), it has been clear that there are limits to the authority of Congress to condition the expenditure of appropriations. This Court has not had occasion to define precisely the limits on the exercise of the spending power, but it has never been doubted that such limits exist. One such limit, perhaps the plainest, is that the spending power may not be employed to accomplish an end inconsistent with some other Constitutional provision.

Congress has recognized that there are uncertain limits on the exercise of its spending power, and it has sought not

to go beyond them. For example, it has been careful in legislation, like Title IX, affecting educational institutions to avoid undue interference with the principle of academic freedom, which "long has been viewed as a special concern of the First Amendment."[1] Furthermore, it has not, in *any* legislation having its basis in the spending power, purported to confer upon private persons individual rights of action to enforce compliance with the conditions imposed by the legislation.

Cort v. *Ash* was concerned with a statute applicable to Presidential elections. The cases on which the Court relied in setting forth the factors "relevant" to the implication question involved for the most part statutes enacted by Congress under the commerce power. None of them involved a law enacted under the spending power.

The factors "relevant" under *Cort* v. *Ash* may also be "relevant" to whether a private right of action is implied under a statute grounded in the spending power, although it has never been so decided. But those factors must be examined, in regard to a spending power statute, with an overriding awareness that Congress, in enacting the statute, has not claimed for itself the substantive power to legislate in the field. Since Congress has never expressly conferred a private right of action under a spending power statute, the Court should not easily find that one is implied.

Implication of a private right of action under Title IX would involve the courts in claims of a type which Congress did not intend the Courts to adjudicate and which are more appropriate for administrative resolution. The description in this brief of litigation currently pending in the District of Connecticut will demonstrate the hazards of too easily accepting the implication of a private right of action.

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1. *Regents of University of California* v. *Bakke*, 98 S.Ct. 2733, 2760 (1978).

ARGUMENT

I.

Congress Recognizes the Limitations upon the Spending Power and has not Used it to Confer Private Rights of Action.

Title IX provides that no person shall be subjected to discrimination on the basis of sex in education programs or activities receiving Federal financial assistance. The statute was patterned directly on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* ("Title VI").[2]

At least insofar as they relate to private institutions of higher education, Title VI and Title IX are without precedent. Congress had never before intervened in the relationship between a private university and its students. The broad reach of the statutes was acknowledged by a sponsor of Title IX, Senator Bayh, during the Senate debate on the measure.

> I doubt very much whether even one institution of higher education today, private or public, is not receiving some Federal assistance. 117 Cong. Rec. 30408 (Aug. 6, 1971).

Because it was intervening in areas traditionally left to state or private ordering, Congress was concerned about the basis of its powers. It found the authority to legislate in the spending power. During the debates on the 1964 Civil Rights Act, Congressman Celler, a sponsor of the legislation, included in the Record a series of memoranda dealing with the constitutionality and legality of various titles of the measure. The memoranda clearly indicate that, unlike the other titles of the Civil Rights Act, which were

2. 117 Cong. Rec. 30407-08 (Aug. 6, 1971) (Remarks of Senator Bayh).

based on Congressional power under the commerce clause and the Thirteenth, Fourteenth and Fifteenth Amendments, Title VI was grounded in the spending power. 110 Cong. Rec. 1521-1528 (Jan. 31, 1964). Discussing the legality of Title VI, one memorandum states:

> Title VI is not an exercise of regulatory authority over activities within the States. Its application is confined to programs and activities which receive Federal financial assistance, by way of grant, loan, or contract and its validity rests on the power of Congress to fix the terms on which Federal funds will be made available. 110 Cong. Rec. 1527.

Title IX merely added the word "sex" to existing law (Remarks of Senator Bayh, 117 Cong. Rec. 30408). Its Constitutional basis is also the spending power. Congressional reliance on the spending power as the Constitutional authority for Titles VI and IX is recognized by the federal respondents (Brief, pp. 29-30).

The spending power is created by Article I, §8, Clause 1 of the Constitution:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

In *United States* v. *Butler*, 297 U.S. 1 (1935), this Court considered the scope of the spending power. The Court accepted the Hamiltonian view, holding that the power to provide for the general welfare is a power to spend federal moneys for any purpose Congress deems to be in the general welfare of the United States. In other words, the power to provide for the general welfare is neither an independent grant of regulatory authority unrelated to expenditures nor a limited grant of authority confined to expendi-

tures in aid of the specifically enumerated powers of Congress.

Having accepted the Hamiltonian position, which essentially permits Congress to fix by statute the conditions upon which moneys shall be expended, the *Butler* Court then limited the spending power by holding that Congress could not use the power to "purchase" a compliance which it is powerless to command. Referring by way of example to appropriations in aid of education, the Court noted:

> There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced. 297 U.S. at 73.

While the *Butler* distinction may be less obvious than the Court assumed, there is no question that Congress has understood that there are constitutional limitations upon its authority to condition the expenditure of appropriations. Such limitations were acknowledged by Mr. Justice Stone, in his dissent in *Butler*, and have been recognized by this Court in later decisions. *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127 (1947).

In enacting Title VI of the Civil Rights Act of 1964, Congress relied on three statutes as precedents for its authority under the spending power to attach conditions to grants of financial assistance by means of such across-the-board legislation: the Work Hours Act of 1962 (40 U.S.C. § 327 *et seq.*), the Anti-Kickback Act of 1934 (18 U.S.C. § 874), and the Hatch Act (5 U.S.C. § 1501 *et seq.*)[3] Each of those statutes creates conditions which are to be included in federal grants or contracts and provides for executive enforcement of those conditions. None creates private judicial remedies.

3. 110 Cong. Rec. 1527, 2467 (Jan. 31, Feb. 7, 1964)

The Hatch Act prohibits certain types of political activity by federal employees and by state or local employees whose employment is financed with loans or grants from the United States. It is enforced by the United States Civil Service Commission. The Commission determines whether a violation of the Act has occurred. If it finds a violation it may order the removal of the employee involved and may order amounts based on the salary of that employee withheld from future federal grants to the State.

The Anti-Kickback Act of 1934 prohibits certain types of payments in connection with federal contracts and establishes criminal penalties for its violation. It was expanded in 1946 to provide civil remedies on behalf of the United States. (41 U.S.C. § 51 *et seq.*)

The Work Hours Act of 1962 is one of a group of statutes in which Congress has regulated wages and hours under the spending power. It, along with the Walsh-Healy Public Contracts Act (41 U.S.C. § 35 *et seq.*) and the Davis-Bacon Act (40 U.S.C. § 276a *et seq.*), establishes wage and hour standards for the employees of contractors providing materials or performing work on projects for the Federal Government or financed with Federal funds. The statutes provide for enforcement by the executive branch and do not create new private judicial remedies.[4] In contrast to these spending power wage and hour statutes, the Fair Labor Standards Act, 29 U.S.C. § 207 *et seq.*, in which Congress regulated wages and hours under the commerce power, does provide an express private right of action.

4. The Work Hours Act and the Davis-Bacon Act do recognize the private rights of action which exist under the Miller Act, 40 U.S.C. § 270a. The Miller Act requires the contractors for public buildings or works to supply payment bonds and provides a right of action for unpaid laborers and materialmen on those bonds. The action is brought in the name of the United States for the private parties. Before individual claims based on the Work Hours Act can be asserted in a private lawsuit under the Miller Act, however, there must be an administrative determination of the validity and amount of such claims and of the fact that amounts withheld by the Federal Government are inadequate to pay the claims. 40 U.S.C. § 330(a), (b).

Where Congress uses its spending power to create across-the-board conditions upon appropriations, it ordinarily requires the executive branch to determine when a condition has been violated and to seek enforcement of the condition. Congress requires similar executive oversight and enforcement in statutes creating conditional grants-in-aid. See, for example, 42 U.S.C. § 1316, which establishes a procedure for a determination by the Secretary of Health, Education and Welfare whether various state social security plans for which the states receive federal funds conform to federal requirements. Congress has not created private rights of action to challenge the state plans.[5]

Title IX conforms to this model. The statute states a general condition to be included in federal grants or contracts, 20 U.S.C. § 1681, and sets out the remedies available to the federal government to enforce that condition, 20 U.S.C. § 1682. It contemplates executive enforcement, but not litigation by third parties. The ultimate remedy is the withholding of future federal funds.

II.

When a Statute is Based on the Spending Power, a Private Right of Action is Not Ordinarily Implied.

In laws based upon its spending power, Congress has never expressly conferred private rights of action to enforce conditions attached to appropriations. Accordingly, the

5. On occasion this Court has permitted a recipient of benefits to challenge a state regulation in the federal Courts on the ground that the state regulation does not conform to federal requirements. See, e.g., *King* v. *Smith*, 392 U.S. 309 (1968); *Rosado* v. *Wyman*, 397 U.S. 397 (1970). As this Court has explained those cases, however, they are not private rights of action arising directly under a spending power statute but are actually Constitutional claims arising under the Supremacy Clause. *Hagans* v. *Lavine*, 415 U.S. 528, 549 (1974). In those cases, 42 U.S.C. § 1983 creates the private right of action.

courts should be less ready than in other cases to find that such rights are implied.

Congressional power to tax and spend is potentially so broad as to reduce the doctrine of enumerated powers to meaninglessness. As the *Butler* case indicates, it is difficult for the courts to define clearly any limits to that power. Yet, Congress has historically recognized some limitations on its use of expenditures to accomplish regulation. Indeed, as Mr. Justice Stone suggested in *Butler* by his reference to "the conscience and patriotism of Congress and the Executive,"[6] the most effective limits on the spending power may be the political considerations inherent in the legislative process.[7] To permit a private right of action in the absence of a clear statement from Congress and to expand the spending power by inference would be to frustrate those political restraints.[8]

The *Cort* v. *Ash* tests for determining whether a private remedy is implicit in a statute not expressly conferring one were developed in cases arising under various regulatory statutes. None of those cases involved a statute based in the spending power. It is not necessary to conclude, however, that the factors "relevant" to the implication question

6. 297 U.S. at 87.

7. See L. Tribe, *American Constitutional Law*, §§ 5-7, 5-10 (1978).

8. This Court recently refused to expand by inference another area of Congressional power in *Santa Clara Pueblo* v. *Martinez*, 98 S.Ct. 1670 (1978). While noting that Congress had plenary authority to regulate the powers of local self-government which Indian tribes possess, the Court refused to infer a private right of action under the Indian Civil Rights Act in the absence of a clear statement from Congress. 98 S.Ct. at 1684. The Court required a clear indication of Congressional intent even though the failure to infer a private action effectively deprived Martinez of any remedy. See dissenting opinion of Mr. Justice White, 98 S.Ct. at 1689, text at Note 6. Of course, a refusal to infer a private right of action under Title IX would not leave petitioner without a remedy. Congress has provided administrative remedies for the enforcement of Title IX.

under *Cort* v. *Ash* are not relevant where the statute is grounded in the spending power. On the contrary, it may be assumed that, if ever a private remedy is to be implied under spending power legislation, the factors enumerated in *Cort* v. *Ash* would be relevant.

However, if the *Cort* v. *Ash* criteria are to be applied in regard to spending power legislation, they should be applied only with an overriding awareness that the legislation is spending power legislation, for which no other constitutional basis is claimed by Congress. With that awareness, the courts should perceive Congressional silence not as an equivocal circumstance, but as an affirmative indication of an intent *not* to create a private remedy. This is as it should be. Under our Constitution, the courts should not discourage Congressional self-restraint under the spending power, which is potentially so broad, and the limits of which are so difficult to define.

Congressional self-restraint is one of the limits on the spending power. Another of the limits is that Congress may not employ the spending power to accomplish an end inconsistent with some other constitutional provision.[9] Academic freedom has "long been viewed as a special concern of the First Amendment."[10] It encompasses the freedom of a university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[11]

In enacting Title IX, Congress recognized that it was permitting some intrusion upon academic autonomy, and it was therefore careful to make the intrusion as small as

9. *Flast* v. *Cohen*, 392 U.S. 83, 104 (1967); *Buckley* v. *Valeo*, 424 U.S. 1, 91 (1976).

10. *Regents of University of California* v. *Bakke*, 98 S.Ct. 2733, 2760 (1978).

11. *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring in result).

the accomplishment of its purposes would permit.[12] It provided for enforcement of the law by an administrative agency having expertise in educational matters. It directed that efforts to achieve voluntary compliance precede any formal enforcement proceedings.

As the briefs of petitioner and various *amici* suggest, a private remedy may differ substantially in kind from the remedies expressly authorized by Congress.[13] Certainly a private right of action would frustrate the statutory requirement[14] (and therefore the legitimate expectation of recipients of funds) that the parties attempt to arbitrate or conciliate their differences before formal enforcement efforts are commenced. In addition, private rights of action would differ from administrative enforcement in expense and potential multiplicity.[15]

Even if Title IX were not based on the spending power, the inconsistency with the legislative scheme of implying a private right of action would be basis enough, under *Cort* v. *Ash*, to reject the implication. In the context of the spend-

12. See remarks of Representative Erlenborn, 117 Cong. Rec. 39248-9 (Nov. 4, 1971), whose amendment limiting the proposed bill was subsequently agreed to by the House.

> Mr. Chairman I offer this amendment to preserve the swiftly eroding right of the colleges and universities of America. We must view title X [which ultimately became Title IX] for what it plainly is just one more giant step toward involvement by the Federal Government in the internal affairs of institutions of higher education. The constant danger is that all too often Federal involvement in the internal affairs of institutions is but the first step toward ultimate Federal control.

13. Brief of petitioner, p. 11; Brief *Amici Curiae* of Federation of Organizations for Professional Women, et al, p. 26; Brief *Amici Curiae* of National Urban League, et al, p. 11; Brief *Amici Curiae* of Lawyers' Committee for Civil Rights under Law, pp. 19-20.

14. See the proviso to 20 U.S.C. § 1682.

15. The federal respondents identify 55 million potential plaintiffs at 97,000 institutions. Brief of Federal Respondents, pp. 49-50.

ing power, however, and Congress' traditional reliance upon governmental enforcement of the conditions of appropriations, the conclusion that no private remedy is implied is inescapable. It is simply inconceivable that Congress intended through Title IX to involve the federal courts in the subjective evaluations and judgments implicit in the relationship between universities and their students.

III.

To Infer a Private Right of Action Under Title IX Would Require the Courts to Adjudicate Claims for which Congress Intended Administrative Enforcement and for Which Administrative Resolution is More Appropriate.

In deciding whether to infer a private cause of action, the court should consider the nature of claims which federal courts might be required to adjudicate. To demonstrate that Title IX claims are more appropriate for administrative resolution, Yale offers as an example the claims in *Alexander, et al* v. *Yale University* (N 77-277, D. Conn.).[16]

Five named plaintiffs, later by amendment increased in number to seven, in 1977 commenced a purported class action under Title IX on behalf of students and faculty affected by allegedly inadequate processing by the university of complaints of "sexual harassment". The allegations of each named plaintiff were contained in a separate count. The first plaintiff, a recent graduate of Yale College, alleged that she had been subjected to sexual advances, "including

16. Federal respondents have misconstrued the current posture of this case. See Brief of Federal Respondents, p. 18. As of this date, the District Court has not yet decided the private right of action question, but is currently considering evidence presented at a court-ordered hearing on the adequacy in fact of the administrative remedy. Moreover, if the federal respondents mean to suggest that the case arises under 42 U.S.C. § 1983 (Brief of Federal Respondents, p. 57), they are incorrect.

coerced sexual intercourse", by a named Yale employee at unspecified times during her four years as an undergraduate, and that she had without success "attempted to complain" to university officials.

The second named plaintiff, a Yale undergraduate, alleged that during office conferences with a named member of the Yale faculty during the spring of 1977, she was "sexually harassed", and as a result "considered complaining" to Yale. When the accused faculty member sought to intervene for the purpose of defending his reputation against these allegations, plaintiffs responded by opposing the motion to intervene and contemporaneously filing an amended complaint in which plaintiffs withdrew all allegations by the second named plaintiff. The accused faculty member was left with no forum in which to refute accusations which were damaging to his personal and professional reputation and which had received, with plaintiffs' active participation, widespread publicity.

The third named plaintiff, a Yale undergraduate, alleged that her "best friend" was subjected to "sexual pressures and attentions" from a named Yale employee during the academic year 1974-1975.

The fourth named plaintiff, a recent Yale graduate, alleged that she had discussed with female undergraduates their complaints about the quality of education of women at Yale, including complaints of "sexual harassment", and that she had attempted without success to have Yale officials act on such complaints.

The fifth named plaintiff, a member of the Yale faculty, alleged that he had received from one of his students the hearsay account that another student had been subjected to "sexual harassment" by another Yale employee, and that he was affected because he was teaching in an atmosphere "poisoned by mistrust".

The sixth named plaintiff, a Yale undergraduate, claimed to have been embraced and kissed on one occasion by the coach of a Yale field hockey team of which she was the manager, and she alleged that she was unable to determine if any channels for complaint were available to her.

The seventh named plaintiff, a Yale senior, alleged that a grade of "C" which she had received in the spring of her sophomore year was not the result of a fair evaluation of her academic work, but was the result of her refusal to comply with the sexual demands of a named instructor. She alleged that after receiving her complaint, Yale refused to alter the disputed grade.

As the result of a motion filed by Yale within twenty days after commencement of the action, the claims of all except the last named plaintiff were, after several months and considerable publicity, dismissed for mootness or other failure to state a claim.

Shortly after dismissal of the other claims, the remaining plaintiff announced her intention to pursue class certification, and sought the disclosure of the details of every complaint of "sexual harassment" (defined to include any sexually suggestive remark made by a Yale employee to a female Yale student, regardless of the context or relationship to educational programs at Yale) during a period beginning three years prior to the enactment of Title IX.

The inappropriateness of judicial resolution of claims of this character underscores the error of ascribing to Congress the intent to create a private remedy. In *Alexander* v. *Yale*, even the threshold question whether there is a class of women students at Yale whose complaints of sexual harassment were inadequately processed by the university may require the District Court to review not only the procedure followed by Yale in each incident, but also the merits of the allegations underlying each complaint, for the adequacy of the relief afforded by the university to each

complainant depends ultimately on the merits of her complaint. And in the course of class certification it will require care to keep confidential both the identity of students who may have complained and the identity of any Yale employees who may have been accused.

On the other hand, an administrative agency such as HEW may, either as the result of a complaint or in the course of a compliance review, assess the adequacy of an institution's procedures. Through a process of conciliation the agency may seek changes in those procedures, without first having to resolve underlying controversies involving students and the institution or its employees.

The petitioner and several of the other *amici* claim that a private remedy is needed because HEW cannot afford individualized relief to the victims of discrimination. The judiciary, however, would be able to give the relief they seek only by placing under judicial supervision areas such as admissions and academic grading at private universities.[17] Absent clear indication that Congress intended such a role for the judiciary, the Court should decline to infer one.

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17. In *Regents of the University of California* v. *Bakke*, 98 S.Ct. 2733 (1978), the Courts were spared the task of determining whether Bakke would have been admitted to the Medical School of the University of California had the special admissions program not been in effect only because the University conceded its inability to demonstrate that he would not have been admitted. 98 S.Ct. at 2743. In the case *sub judice* the universities have made no such concessions. If Title IX provides a private right of action, the District Court will be placed in the role of admissions committee.

CONCLUSION

The decision and judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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